McIntyre vs. *Agricul. Bank*, 1 Freem. Ch. R. 105; 1 Johns. Cas. 160; 4 Kent's Com. 159, 160; 3 Stew. & Port. 408. Further as to nature of the trust: *Harrison* vs. *Battle*, 1 Dev. Eq. 541; *Leonard* vs. *Ford*, 8 Ire. (Law) 418; *Jenks* vs. *Alexander*, 11 Paige 619, 624.

In our next we propose to consider the *mode of executing* the power; and herein of notices of sale; when equity will enjoin and when set aside sales; effect of sales in barring equity of redemption and cutting off subsequent lienholders; trustee's deed; of the right to the surplus, &c., &c.

J. F. D.

Davenport, Iowa.

RECENT AMERICAN DECISIONS.

MOSES WELLS *vs.* SOMERSET & KENNEBEC RAILROAD COMPANY.

It is provided by § 5, c. 81, of R. S. of 1840, that in locating railroads, "no corporation shall take any meeting-house, dwelling-house, or public or private burying-ground, without the consent of the owners thereof." *Held*, that the term dwelling-house, as here used, means only the house, and includes no part of the garden, orchard, or curtilage.

The right of eminent domain confers upon the Legislature authority to take private property for public uses, when the public exigencies require it, subject only to that provision of our Constitution which exacts just compensation; and a dwelling-house is no more exempt than any other species of real estate, when the Legislature, in the exercise of that right, determines that the public exigencies require it.

Exceptions from the ruling of RICE, J.; *also, on motion of defendants to set aside the verdict.*

This was an action of the case for entering the plaintiff's close and erecting thereon a bridge. The various questions of law, upon

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3d. That a mortgagee or trustee may vote if actually in *possession* for the requisite period, but not otherwise: Appendix to 5 Ired. Eq.

Tested by ancient common law principles, this decision was undoubtedly right. Kent's criticism of Judge TROWBRIDGE's doctrines on mortgages would apply to it. "It is in the rear of the improvements of the age in this branch of science; it is an affront to common sense to hold that the mortgagor, even of a freehold interest, is not the real owner:" 4 Com. 195.

which the Judge at *Nisi Prius* gave instructions to the jury, were argued by

Bradbury, Morrill & Meserve, for the defendants, and by

J. Baker, for the plaintiff.

It was contended by the counsel for the plaintiff, that the instruction that the defendants could not so locate upon the plaintiff's land connected with his dwelling-house as necessarily to deprive him of the reasonable use thereof as a dwelling-house, was correct. It was a necessary part of the dwelling-house. R. S. of 1840, c. 81, § 5; also c. 51, § 1. Instructions more favorable would render the Statute provision nugatory. The word is used either in its proper or technical sense, and either will carry with it the land necessary to its use. Bouvier's Law Dic., "*House;*" R. S., c. 1, § 4; 13 Met. 109; 2 Greenleaf's Cruise 642; 27 Maine 357, 360; 3 Mason 280 and 284; 1 Sumner 500.

From the view taken by the Court of this instruction, further reference to the other questions of law, the evidence reported, and the arguments of counsel relating thereto, becomes unnecessary.

The opinion of the Court was delivered by

CUTTING, J.—The defendants, on the trial, contended *that* the premises in controversy, at the time their road was located, were owned by one Frederick Wingate, to whom they have paid the land damages; *that* the whole width of their road was located north of the northerly line of the plaintiff's land; consequently the dividing line of the two lots became a question of fact, and much evidence, touching that point, was submitted to the jury. The case finds that several deeds, plans, and locations used at the trial are submitted, but none have been furnished, and, from the view taken, they become unnecessary.

It was claimed by the plaintiff that a portion of the road was located on his lot, and so near to his dwelling-house as seriously to incommode him in its occupancy. Upon this point the Judge instructed the jury, "*that* the defendants could not take the plaintiff's

dwelling-house, nor so locate upon his land connected therewith, as necessarily to deprive him of the reasonable use thereof as a dwelling-house, and, whether they had so done, was a question for them to determine." This ruling raises a question as to the construction of R. S. of 1840, c. 81, § 5, under which the location was made, and which provides that "no corporation shall take, as aforesaid, any meeting-house, dwelling-house, or public or private burying-ground, without the consent of the owners." The correctness of that part of the instruction which related to the dwelling-house is not controverted, but only the subsequent part which refers to the inconvenient proximity of the road to the house.

It is contended, by the plaintiff's counsel, that the word "house" is used either in its popular or technical sense, and will carry with it the land necessary for its use; and, to this point, is cited *Bouvier's* definition, sustained by numerous authorities, that "in a grant or demise of a house, the curtilage and garden will pass," and hence, it is argued, that whatever passes under the term house is not within the defendants' control by force of their charter or any law of the State. And, further to sustain this view, R. S., c. 1, § 4, is referred to, which provides that "words and phrases are to be construed according to the common meaning of the language. Technical words and phrases, and such as have a peculiar meaning, are to be construed as conveying such technical or peculiar meaning."

If the word dwelling-house have a technical meaning, it has also a common meaning,—such as, "a building inhabited by man." *Bouvier.* "The house in which one lives." *Webster.* We think the Legislature, in the enactment of our statutes, must have understood the term dwelling-house as having a common and not a peculiar or technical meaning; otherwise burglary may be committed by a felonious breaking and entry in the night time into a garden or curtilage, or a civil process may be served, by leaving a copy in the debtor's garden or door yard, as his last and usual place of abode. Indeed, the plaintiff cannot contend for a technical construction without impeaching the ruling which he attempts to uphold. His doctrine would prohibit the defendants from locating upon the curtilage, the garden, and, according to *Bacon's* definition,

the orchard of the plaintiff, a doctrine which might exclude any railroad track from entering or passing through cities, villages, or any densely populated place. Such has never been the cotemporaneous construction of, or practice under, the Act.

The right of eminent domain is an attribute of sovereignty, and confers upon the Legislature authority to take private property for public uses, when the public exigencies require it, subject only to that provision in our Constitution which exacts just compensation. By this fundamental law a dwelling-house is no more exempt than any other species of real estate, when the Legislature shall resolve that the public exigencies require it. Hence the statute authorizing "the pulling down or demolishing any building to prevent the spread of fires," &c. Hence, "any railroad corporation may take and hold so much real estate as may be necessary for the location, construction, and convenient use of said road," without the consent of the owner, except a meeting-house, dwelling-house, or public or private burying-ground. And, we have seen that the term dwelling-house, as used in the statute, means only the house, and includes no part of the garden, orchard or curtilage. But the ruling excepted to not only excludes the house, but also so much of the adjoining land as is necessary for its reasonable use; whereas the statute makes no such exemption. Our neighbor's land-marks may be as readily removed by an erroneous construction of a statute as by physical force, and, should the law be settled in conformity with the instruction, every railroad corporation would be left to the mercy of the owners of dwelling-houses situated in the vicinity of the locations; for, if the company have taken land without consent, necessary for the reasonable use of the house, it has exceeded its authority, as much so as though it had taken the house itself, and its daily use is a daily trespass, subjecting the corporation even to an indictment for erecting and continuing a nuisance. Every individual whose land has thus been taken might institute suits, and raise issues of fact for the jury, as to whether too great encroachments had been made upon their dwellings. The right of eminent domain, thus exercised, would become a farce, and a railroad, to be permanent, should be located in a wilderness. And, hence, we per-

ceive the wisdom of the Legislature in making no such exemptions—creating no such uncertainties, and laying no such foundation for endless litigation ; while, on the other hand, ample provision is made to obtain indemnity for such encroachments, and it has been the uniform practice, if we mistake not, of the County Commissioners, having jurisdiction over the subject-matter, to assess damages proportionate to the injury sustained. *Vide Dodge* vs. *County Commissioners of Essex*, 3 Met. 382.

Exceptions sustained, verdict set aside, and new trial granted.

The foregoing case, which we have received through the courtesy of Mr. Justice CUTTING, involves a question of some practical interest: how far such public or private structures as meeting-houses and dwelling-houses may be said to include adjoining lots sufficient to make their use convenient or comfortable. In a popular sense, these terms may be used to designate not only the structures, and the land upon which they stand, but the adjoining lot and such convenient accessory out-buildings as were constructed exclusively for use in connection with the principal buildings. But in a strict legal sense, we should never have expected these terms to receive so extended a construction.

The statute upon which the principal case arose is one which we should not expect many of the states would adopt. It abridges the power of these public works in regard to the adoption of the most eligible route, in a manner which has not been common in other countries. The same result is attained in the English statute, by providing that when a railway, or other company possessing the power of eminent domain, desires to take any portion of the lot or gardens belonging to a dwelling-house or other building, of the several classes enumerated in the statute, they shall take the whole of the connected premises, if the owner shall so elect: 8 and 9 Vict. ch. 18, § 192. The terms of the English statute are house, garden, yard, warehouse, building, or manufactory. This was held not to extend to a lumber yard: Stone *vs.* Commercial Railway, 9 Sim. 621; s. c., 1 Railw. Cas. 375; Regina *vs.* Sheriff of Middlesex, 3 Railw. Cas. 396.

By the English statute, it has been considered that the owner had an option whether the company should take the whole or a part of the connected premises, when the whole was not required for their convenient use: Sparrow *vs.* Oxford W. & W. Railway Co., 13 Eng. Law & Eq. Rep. 33. But the company, by giving notice to take part, will not be bound to take the whole, upon the owner so electing, provided the company ultimately prefer waiving their claim altogether: Queen *vs.* London & S. W. Railway Co., 5 Railw. Cas. 669. I. F. R.